

No. 77-1547

Supreme Court, U. S.
FILED

JUN 5 1978

MICHAEL ROBAK, JR. CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

DOUGLAS OIL COMPANY OF CALIFORNIA AND PHILLIPS
PETROLEUM COMPANY, PETITIONERS

v.

PETROL STOPS NORTHWEST, GAS-A-TRON OF ARIZONA,
COINOCO AND UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

JOHN H. SHENEFIELD,
Assistant Attorney General,

ROBERT B. NICHOLSON,
PETER L. DE LA CRUZ,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1547

DOUGLAS OIL COMPANY OF CALIFORNIA AND PHILLIPS
PETROLEUM COMPANY, PETITIONERS

v.

PETROL STOPS NORTHWEST, GAS-A-TRON OF ARIZONA,
COINOCO, AND UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is reported at 571 F. 2d 1127. The order of the district court (App. 1a-3a)¹ is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 1978. The petition for a writ of certiorari was filed on April 28, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

¹"App." refers to the appendix to this brief. "Pet. App." refers to the appendix to the petition.

QUESTIONS PRESENTED

1. Whether the district court in which a grand jury was impaneled is authorized to make a limited disclosure of grand jury materials for use in a private antitrust case pending in another district.

2. Whether the district court abused its discretion when it authorized disclosure of grand jury materials based on a showing of particularized need for the limited purposes of impeachment or refreshing recollection of witnesses.

STATEMENT

In March 1975 a grand jury in the Central District of California indicted Douglas Oil Company of California (Douglas) and Phillips Petroleum Company (Phillips) for price fixing of rebrand gasoline.² The district court accepted pleas of *nolo contendere* by Douglas and Phillips in December 1975 and the criminal action was terminated (Pet. App. A1-A2). *United States v. Phillips Petroleum*, C.D. Cal., No. 75-377-MML.

In December 1976, Petrol Stops Northwest, Gas-A-Tron of Arizona and Coinoco (collectively "Petrol Stops") filed a petition in the District Court for the Central District of California seeking production of all grand jury transcripts made available to Phillips and Douglas during the criminal proceedings and all documents produced by Phillips and Douglas which were subpoenaed by the grand jury (Pet. App. A2). Petrol

²"Rebrand gasoline" was defined in the indictment as gasoline sold for resale in service stations under a trademark or brand name not owned or controlled by an oil refiner (see Pet. 5 n. 4).

Stops sought to use the materials in private antitrust cases it had begun in the District of Arizona in 1973 (Pet. App. 2a).³

After holding a hearing (Pet. App. B1-B15), the district court authorized Petrol Stops to inspect and copy transcripts of grand jury testimony and documents produced by Phillips and Douglas (App. 1a). It limited disclosure to counsel for Petrol Stops in the pending Arizona antitrust cases (App. 2a-3a) and further limited the use of the grand jury material "solely for the purpose of impeaching or refreshing the recollection of a witness, either in deposition or at trial" (App. 2a).

The court of appeals unanimously affirmed (Pet. App. A1-A8). It found that the indictment charged antitrust violations similar to those alleged in the private actions (Pet. App. A1-A2), and held that the district court's "carefully limited disclosure" comported with prevailing case law and was not an abuse of discretion (Pet. App. A4-A8).

ARGUMENT

The decision of the court of appeals is correct, does not conflict with any decision of this Court or any other court of appeals, and raises no issue warranting further review.

1. Petitioners' primary contention, that the district court in which the civil antitrust action is pending must determine the merits of disclosure (Pet. 8-10), is insubstantial.

³The private cases alleged that Douglas, Phillips and others had fixed prices and restricted access to gasoline in violation of Sections 1 and 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1 and 2. *Petrol Stops Northwest v. Continental Oil Company*, D. Ariz., Civ. No. 73-212 TUC-JAW; *Gas-A-Tron of Arizona v. Union Oil Company*, D. Ariz., Civ. No. 73-191 TUC-WCF.

To the extent that petitioners argue for a flat rule that would oust the district court in which the grand jury was convened from any authority to decide the merits of disclosure of the grand jury material, their argument is plainly unsound. Rule 6(e) of the Federal Rules of Criminal Procedure contemplates such disclosure. Extensive precedent supports it. *State of Illinois v. Sarbaugh*, 552 F. 2d 768 (C.A. 7), certiorari denied *sub nom. J.L. Simmons Co., Inc. v. State of Illinois* No. 76-1661, October 11, 1977; *Gibson v. United States*, 403 F. 2d 166 (C.A. D.C.); *Herman Schwabe, Inc. v. United Shoe Machinery Corp.*, 21 F.R.D. 233 (D. D.C.). Significantly, petitioners cite no authority for their proposition, which would work an unprecedented and unwarranted restriction on the authority and discretion of district courts.

To the extent that petitioners simply argue that the district court on the facts of the present case abused its discretion in deciding the disclosure question rather than transferring the matter to the district court in Arizona, it is sufficient to state that the court of appeals resolved the issue against petitioners, and that it is not appropriate for review here.

2. Contrary to petitioners' assertions (Pet. 11-14), the decision below does not conflict with this Court's decision in *United States v. Procter & Gamble Co.*, 356 U.S. 677, or with the decision of any other court of appeals. In *Procter & Gamble* the Court stated that a party seeking discovery of grand jury testimony "to impeach a witness, to refresh his recollection, to test his credibility and the like" may obtain it upon a showing of "particularized need." *Id.* at 683. In the present case the district court authorized disclosure of grand jury transcripts "solely for the purpose of impeaching or refreshing the recollection of a witness" (App. -a). The court of appeals properly held that Petrol Stops had established particularized need

for this discrete and limited disclosure by its showing of possible contradictions between answers Douglas and Phillips made to interrogatories in the private suits and the charges in the indictment to which they pleaded *nolo contendere* (Pet. App. A7).⁴ Petitioner's contention that there was no showing of particularized need, or even relevance, because of the differences between the indictment and the private antitrust complaints (Pet. 12-13) is a factual issue resolved against them below (Pet. App. A2).

Similarly, there is no conflict between the instant decision and those of other circuits. In the present case, as in *State of Illinois v. Sarbaugh*, *supra*, and *United States v. Alton Box Board Co.*, C.A. 7, No. 77-1697 decided December 1, 1977, petition for a writ of certiorari pending, No. 77-1390, the court deemed the showing of particularized need to be satisfied by plaintiffs' need to prepare for witness examination at deposition or trial. In arguing (Pet. 13-14) that there is a conflict between these decisions and *State of Texas v. United States Steel Corp.*, 546 F. 2d 626 (C.A. 5), certiorari denied, No. 76-1710 October 11, 1977, petitioners ignore a critical distinction. *State of Texas* held only that disclosure during the criminal proceedings to a corporate defendant of its employee's testimony was not in itself sufficient to show particularized need warranting further disclosure in a civil suit. Nothing in the *State of Texas* decision indicates that if the additional factor of preparing for witness examination had been present disclosure would have been denied.

⁴The court of appeals also found that Petrol Stops had pointed out on appeal "inconsistencies between the government's bill of particulars and statements made in recent depositions" (Pet. App. A7).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JOHN H. SHENEFIELD,
Assistant Attorney General.

ROBERT B. NICHOLSON,
PETER L. DE LA CRUZ,
Attorneys.

JUNE 1978.

APPENDIX

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PETROL STOPS NORTHWEST, ET AL.,

PETITIONERS,

vs.

UNITED STATES OF AMERICA,

RESPONDENT,

DOUGLAS OIL COMPANY OF CALIFORNIA, ET AL.,

REAL PARTIES IN INTEREST.

ORDER

Miscellaneous

No. 5706

The petition to inspect and copy transcripts of grand jury testimony and documents produced by Phillips Petroleum Company and Douglas Oil Company of California to the Antitrust Division, Department of Justice or to the federal grand jury issuing the indictment in *U.S. v. Phillips, et al.*, Criminal Docket No. 75-377, came on for hearing before this Court, the Honorable William P. Gray, District Judge, presiding. All parties being represented by counsel and the issues having been duly briefed and argued to the Court and the Court being fully advised, hereby orders and adjudges:

IT IS HEREBY ORDERED AND ADJUDGED that the Petition for Production for Inspection of the Transcripts of Grand Jury Testimony and Documents Produced Pursuant to Grand Jury Subpoena filed by petitioners on December 15, 1976 is granted; and

(1) The Chief of the Los Angeles Office of the Antitrust Division of the United States Department of Justice is hereby ordered to produce for petitioners' inspection and

copying all grand jury transcripts previously disclosed to Phillips Petroleum Company or Douglas Oil Company of California or their attorneys relating to the indictment in *United States v. Phillips, et al.*, Criminal Docket No. 75-377;

(2) The Chief of the Los Angeles Office of the Antitrust Division of the United States Department of Justice is hereby ordered to produce for petitioners' inspection and copying all documents produced by Phillips Petroleum Company or Douglas Oil Company of California to the government in connection with the grand jury investigation resulting in the indictment in *United States v. Phillips, et al.*, Criminal Docket No. 75-377;

(3) All transcripts, documents or information contained in any transcript or document produced pursuant to this Order shall be disclosed only to counsel for petitioners in connection with the two civil actions, *Gas-A-Tron of Arizona, et al. v. Union Oil Company of California, et al.*, Civil No. 73-191 TUC-WCF, and *Petrol Stops Northwest v. Continental Oil Company, et al.*, Civil No. 73-212 TUC-JAW, now pending in Arizona, and the documents, transcripts or information contained therein may be used by them solely for the purpose of prosecuting or defending against claims in the *Gas-A-Tron* and *Petrol Stops* lawsuits. The transcript of the testimony of each grand jury witness produced pursuant to this Order may be used in such cases solely for the purpose of impeaching or refreshing the recollection of a witness, either in deposition or at trial.

(4) No transcript or copy provided pursuant to this Order shall be further copied or reproduced in whole or in part and every transcript or copy produced hereunder shall be returned to the Chief of the Los Angeles Office of

the Antitrust Division of the United States Department of Justice upon completion of the purposes authorized by this Order.

DATED this 4 day of May, 1977.

United States District Judge